Department of Energy
Acquisition Regulation

No. 88-1
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ACQUISITION LETTER

This Acquisition Letter (AL) is issued by the Director, Procurement and Assistance Management Directorate pursuant to a delegation from the Secretary. Material published in this AL is effective upon receipt.

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CITATION	TITLE
952.227-78	Rights in Technical Data-Facilities

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The purpose of this AL is to provide (1) information on recent Department of Energy (DOE) policy changes with respect to copyright of computer software by Management and Operating (M&O) contractors, and (2) a revised rights in technical data clause (Attachment 1) to be used in M&O contracts in lieu of the existing Rights in Technical Data-Facilities (Apr 1984) clause (DEAR 952.227-78).

The intent of DOE's revised technical data policy is to allow M&O contractors to secure copyrights, to the maximum extent, for all scientific and technical software funded by DOE in accordance with this policy except where such release (1) would be detrimental to national security, (2) would not enhance the appropriate transfer or commercialization of such software, (3) would have a negative impact on U.S. industrial competitiveness, or (4) would prevent DOE from meeting its obligations under international treaties and agreements.

For purposes of this policy, affected program offices may designate on a class or program basis those program or funding areas under their cognizance that are excluded from this policy based on a predetermination by the responsible Program Assistant Secretary or his or her designee of the applicability of one or more of the exceptions noted above. Computer software packages developed with Naval Reactors funding or those that are classified are excluded from this policy on a class basis.

When it is not clear which program funded the computer software package, such as where the software was funded out of a contractor's overhead account, the program which provided the primary source of funding for the contractor will be designated as the program under which the software was funded for the purposes of this AL and the notification requirements under the attached technical data clause.

The attached technical data clause contains revised copyright terms in paragraphs (c) and (d). Paragraph (d) is specific to the copyright of computer software and prescribes those terms and conditions that give effect to the Department's intent to release copyright of DOE-funded computer software to DOE M&O contractors in accordance with this policy. Any request to deviate from this technical data clause for a particular contract must be approved by the Assistant General Counsel for Patents, except for changes to subparagraph (d)(1)(iii)(0) which covers conflict of interest. Because the language in the clause is minimal with respect to conflict of interest, a contracting activity may find it necessary to supplement the coverage for a particular contract. Such supplemental coverage may be approved by Patent Counsel at the contracting activity rather than at the Headquarters level.

The contracting officer (CO) shall use the revised Rights in Technical Data-Facilities (May 1988) clause for new and renewal (extension) awards of M&O contracts entered into after the issuance of this AL. The CO may also amend existing M&O contracts at any time by mutual agreement to include this clause.

If you have any questions on this AL, please contact Cherie Seckinger, Office of Policy at FTS 896-9737 or Richard A. Lambert, Office of the Assistant General Counsel for Patents, at FTS 896-2802.

This AL shall remain in effect until superseded or modified by another AL or until the DOE Acquisition Regulation is modified to revise 952.227-78, whichever occurs earlier.

Rights in Technical Data-Facility (May 1988)

(a) Definitions.

(1) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents, or computer software (including computer programs, computer software data bases and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(iii) Are not already available to the Government without obligation concerning their confidentiality.

(3) "Unlimited rights" means rights to use duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) Allocation of rights.

(1) The Government shall have:

(i) Ownership in all technical data first produced in the performance of the contract;

(ii) The right to inspect technical data first produced or specifically used in the performance of the contract at all reasonable times (for which inspection the proper facilities shall be afforded DOE by the contractor and its subcontractors);

(iii) The right to have all technical data first produced or specifically used in the performance of the contract delivered to the Government or otherwise disposed of by the contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this contract, provided that nothing contained in this paragragh shall require the contractor to actually deliver any technical data, the delivery of which is excused by this Rights in Technical Data clause;

(iv) Unlimited rights in technical data specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design; the contractor agrees to leave a copy of such technical data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer; provided, that if such data are proprietary, the rights of the Government in such data shall be governed solely by the provisions of optional paragraph (e) hereof-"Limited Rights in Proprietary Data;"

(v) The right to remove, cancel, correct, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the contractor of the action taken.

(2) The contractor shall have:

(i) The right to withhold its proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract, provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the contracting officer.

Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(c) Copyrighted material (other than computer software).

(1) The contractor may establish, without prior approval of the contracting officer, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this contract, and published in academic, technical or professional journals, symposia proceedings or similar works. When claim to copyright is made, the contractor shall affix the applicable copyright notice of 17 USC 401 or 402 and acknowledgement of Government sponsorship (including contract number) in the data when such data are delivered to the Government as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If the contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the contracting officer to include such material in the technical data prior to its delivery.

(d) Copyrighted material (computer software).

(1) The contractor shall have the right to establish claim to copyright in computer software first produced by the contractor in performance of the contract subject to the following:

(i) Notification by Contractor of Its Intent to Copyright.

(A) The contractor shall notify the Patent Counsel in writing (3 copies) of its intent to copyright computer software pursuant to this clause. Each notification by the contractor to be complete must identify (1) the subject computer software by name and function, (2) the program under which it was funded, (3) whether the data is subject to an international treaty or agreement, (4) whether data is subject to export control, (5) the contractor's plans for commercializing the software including the information of paragraph (iii)(I) herein, and (6) whether the contractor elects to retain copyright subject to a broad or limited Government license pursuant to paragraph (iii)(c). For software that is developed using other funding sources in addition to DOE funding, approval of release to secure statutory

copyright protection in accordance with this clause must also be obtained by the contractor from all other funding sources prior to the contractor's notification to the Patent Counsel. Such notification shall include the contractor's certification or other documentation acceptable to the Patent Counsel demonstrating such approval has been obtained.

(B) The right of the contractor to establish a claim to statutory copyright in excepted categories of computer software as determined by DOE is expressly withheld. Such excepted categories currently include computer software whose release (1) would be detrimental to national security, i.e., involves classified information or data or sensitive information under Section 148 of the Atomic Energy Act of 1954, as amended, or is subject to export control for nonproliferation and other nuclear-related national security purposes, (2) would not enhance the appropriate transfer or dissemination and commercialization of such software, (3) would have a negative impact on U.S. industrial competitiveness, or (4) would prevent DOE from meeting its obligations under international treaties and agreements. Where computer software is determined to be under an export control restriction, the contractor may still secure copyrights to such restricted computer software for purposes of limited commercialization within the constraints provided by the export control authorities subject to the provisions of this clause. However, notwithstanding any other provisions of this contract, all computer software packages developed with Naval Reactors funding and those that are classified fall within the above excepted categories and the right to copyright will not be granted by DOE. Additionally, the right of the contractor to establish a claim to statutory copyright in computer software is subject to the disposition of data rights in the treaties and international agreements identified under this contract as well as those additional treaties and international agreements which DOE may from time to time identify by unilateral amendment to the contract pursuant to (insert ref. to patents article); such added treaties are effective only for software for which notification of intent to copyright is made after the date of such amendment.

(ii) DOE Review and Response to Contractor's Notification.

(A) The Patent Counsel shall respond in writing within 90 days of receipt of a complete notification by the contractor of its intent to copyright computer software pursuant to this clause. Such response shall indicate whether the software falls within one or more of the excepted categories preventing the Contractor from claiming copyright in the software, release the right to assert copyright in the software to the contractor, or advise the

contractor that DOE needs additional time to respond and the reasons therefor. The 90-day period for DOE to respond shall not begin until DOE has received a complete notification from the contractor addressing each of the factors enumerated in paragraph (i)(A) above.

(B) If the Patent Counsel does not respond or request additional time within the foregoing time period, the contractor may then establish claim to copyright, except that for software funded by Defense Programs, Civilian Radioactive Waste Management and Nuclear Energy Programs, the contractor shall not proceed to establish copyright protection or begin licensing the software before receiving the Patent Counsel's written response that the software does not fall within an excepted category.

(iii) Releasing the Right to Copyright Computer Software to the Contractor.

(A) The Contractor shall furnish: (1) the source code for each software program released in printed and machine readible form and, (2) at least the minimum documentation needed by a technically competent user to understand and use the software, to the National Energy Software Center (NESC) at the time claim to copyright can be established under paragraph (ii)(B) above. The contractor shall also send to NESC copies of all related additional material (updates, additional documentation) and of all derivative works created by the contractor under its contract or furnished to the Contractor by licensees pursuant to paragraph J below, upon creation or receipt. Contractor acknowledges that NESC may provide a technical description of the software in an announcement identifying its availability from the copyright holder, and NESC may provide a copy of the printed version of the basic program for licensing in accordance with subparagraph (D) below with contractor's copyright notice when requested to do so by another party.

(B) The software shall normally be licensed to the user public on a nonexclusive basis. The contractor may exclusively license or assign the software to a software distribution organization which will be subject to those same conditions. Any other situations in which some form of exclusivity may be justified, such as where the software is used with licensed patented processes or equipment, shall be approved in advance by the Assistant General Counsel for Patents.

(C) At the time of notification of intent to establish claim to copyright, the contractor shall elect whether to retain copyright subject to:

(a) a broad Government license as follows:

The Government retains for itself and others acting on its behalf a paid-up, nonexclusive, irrevocable worldwide license to reproduce, distribute to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so; or

(b) a limited Government license as follows:

The Government retains a paid-up, nonexclusive, irrevocable worldwide license to reproduce, prepare derivative works, perform publicly and display publicly by or for the Government, including the right to distribute to other Government contractors.

(D) With respect to the printed version of the basic program, the Government retains a paid-up, nonexclusive, irrevocable worldwide license to reproduce and distribute to the public human readable copies only and to permit others to do so. The rights of the recipient shall be those of a licensee only and ownership of any copies of the program shall remain the property of the Government. The recipient-licensee shall not reproduce or make copies of the program or authorize others to do so.

(E) If the limited Government license is elected, it shall revert to the broad Government license after a period of one year from the time claim to copyright can be established under paragraph (C)(b) above if DOE determines that the contractor has not taken reasonable steps to actively seek licenses of the software or two years from the time claim to copyright can be established under paragraph (C)(b) above if DOE determines the contractor has not licensed the software. The contractor shall provide the contracting officer with a report of its licensing efforts in accordance with this paragraph at the expiration of said one and two year periods, respectively, unless otherwise provided by the contracting officer. Failure to provide these reports will be considered as acknowledgement by the contractor of license reversion.

(F) If the limited Government license is elected, the software shall be offered to the user public at a reasonable license royalty rate established to ensure widespread commercialization and substantial dissemination of the software. In establishing the reasonable royalty, the contractor may take cognizance of the rate based on recovery

of full cost of materials and services as set forth in 10 CFR 1009. The contractor may include the cost (including Government and private costs) of writing, testing, debugging and validating experimentally or otherwise the computer program and enhancements thereto, writing the documentation, compiling and entering data bases, and licensing the software.

(G) Whenever the contractor is permitted to establish claim to copyright in software, the contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and also an acknowledgement of Government sponsorship and license rights on each software package and derivative work. Such action shall be taken when the software is delivered to the Government, published, licensed, or deposited for registration as a published work is the U.S. Copyright Office. The acknowledgement of Government sponsorship and license rights shall be as follows:

> This material resulted from work developed under a Government contract and is subject to the following license: (insert license elected under para. (iii)(c)(a) or para. (iii)(c)(b) above, when applicable). Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights.

(H) The contractor shall use copyright license terms and conditions which are consistent with this contract clause and shall make the basic terms and conditions, exclusive of matters considered by the licensee to be business and financial information which is considered to be privileged, available to Patent Counsel upon request.

(I) The commercialization plan submitted by the contractor should identify whether derivative works will result from commercialization and who will control such works, who will maintain the software, and who will provide the funding for any of these activities. The plan should also identify, when appropriate, whether any reduced licensing fees or other consideration is

factored into the proposed arrangements and the impact of the proposed license arrangements upon U.S. industrial competitiveness. Appropriate consideration should be given to licensing the software in a manner which will benefit U.S. industry.

(J) The contractor should include in its licensing agreements a limited Government license right as described above for enhancements, derivative works and documentation developed at private expense where (1) the costs incurred by the Government in developing the software are substantial compared to that incurred by the licensee or contractor at private expense and (2) the intended use by the Government or its contractors is sufficient to warrant such rights. Further, the licensing agreement shall provide that the Secretary may require the contractor, assignee, or exclusive licensee of the copyrighted software to grant a nonexclusive, partially exclusive, or exclusive license to a responsible applicant upon terms that are reasonable under the circumstances, and, if the contractor, assignee, or exclusive licensee fails to grant such a license, the Secretary may grant the license, if the Secretary determines the action is necessary:

(a) Because the contractor, assignee or exclusive licensee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the copyrighted software;

(b) To alleviate health, safety, or energy needs that are not reasonably satisfied by the contractor, assignee, or exclusive licensee; and

(c) To meet requirement for public use specified by Federal regulations and the requirements are not reasonably satisfied by the contractor, assignee, or exclusive licensee.

(K) No costs under this contract are allowable as direct or indirect costs for the preparation, filing or prosecution of copyright applications or the payment of related fees or licensing and marketing costs where the contractor establishes claim to copyright in computer software pursuant to this clause except as may be otherwise provided in

this paragraph. Nor shall any costs be allowable for maintenance of the copyrighted software, except as expressly provided for in writing by the contracting officer. The contractor may use its net royalty income to effect such maintenance costs.

(L) At the termination or expiration of this contract, the following terms and conditions shall apply to copyrights for computer software and licenses and royalties generated therefrom:

(a) For any license executed prior to termination or expiration of this contract for copyrighted software, the distribution of net royalties or income therefrom shall remain the same as prior to contract termination or expiration and shall continue for the duration of such license. The percentage of such royalties or income being used at the Facility shall go to the successor contractor at the Facility pursuant to its contract or, in the absence of a successor contractor, to such other entity designated by the Government.

(b) For any assignment executed to a party other than an affiliate of the contractor, prior to termination or expiration of this contract, for copyrighted software, the distribution of net royalties or income therefrom shall remain as prior to contract termination or expiration and shall continue for the duration of such assignment. The percentage of such royalties or income being used at the Facility shall go to the successor contractor at the Facility for use at the Facility pursuant to its contract or, in the absence of a successor contractor, to such other entity designated by the Government.

(c) Where title to a copyright for computer software has been retained by the contractor or an affiliate of the contractor, the contractor and Government shall enter negotiations prior to such termination or expiration with respect to retention of the title to the copyright by the contractor or its affiliate or transfer of such title to DOE or the successor contractor operator of the Facility depending on whether commercialization of the software is being performed principally by the contractor or affiliate at the Facility or at a

separate location. Such negotiations shall also consider the equities of the parties with respect to each copyright and shall take into consideration the presence of private investment, potential commercial use, assumption of copyright related liabilities, effective technology transfer and the need to market the technology.

(d) Where title to a copyright for computer software is to be retained by the contractor or its affiliate subsequent to termination or expiration of the contract, the contractor and the Government shall enter negotiations prior to such termination or expiration with respect to net royalties or income generated from assignments or licenses of such copyright effected subsequent to termination or expiration of the contract and the distribution thereof between the contractor and successor contractor at the Facility for use at the Facility pursuant to its contract or, in the absence of a successor contractor, to such other entity designated by the Government. Such negotiations shall consider the equities of the parties and other conditions as set forth in paragraph (c) above. However, the net royalty or income distribution to the Facility for use by a successor contractor or other Government-designated entity shall in no event be less than twenty-five percent (25%) of such net royalties or income.

(M) Five percent (5%) of gross royalty revenues will be set aside for DOE use or for third party use at the direction of the contracting officer during the five years following each election by the contractor to assert copyright in computer software. Unless otherwise instructed by the contracting officer, the 5% royalty revenues shall be made payable quarterly to the National Energy Software Center and sent to the Director, National Energy Software Center, 9700 South Cass Avenue, Argonne, Illinois 60439. The contracting officer shall be notified when such payments are made. Additionally, at least fifty-one percent (51%) of the net royalty revenues shall be used at the Facility by the contractor for scientific research, development and educational purposes.

Under the authority of Section 646(a) of the DOE Organization Act, the contractor and DOE hereby

agree to cooperatively establish and co-fund a program of technology transfer consistent with this and other articles of this contract. DOE's contribution to this program is the allowable costs for overall technology transfer activities. The contractor's contribution to this program shall be derived from royalties received. Further, it is understood that the contractor may under the authority of Section 646(a) of the DOE Organization Act, utilize its royalty funds in other cooperative agreements with DOE for scientific research, development and education purposes. However, under no circumstances shall the royalties be used for the augmentation of general DOE program funds.

The contractor shall include as a part of its annual Facility Institutional Plan or other annual document an auditable detailed plan setting out those uses to which such royalty funds will be applied at the Facility and, detailed statement of how the funds were actually used. Such uses shall be consistent with the mission and objectives of the Facility and shall be subject to prior DOE approval. The contractor's use of the royalties shall be evaluated as part of the annual appraisal process.

For purposes of this clause, net royalty revenues comprise gross royalty revenues or its equivalent less licensing costs, awards to software creators, the cost of modifications to the software made at private expense and any costs of software support of maintenance services furnished licensees, if separately itemized and accounted for. Upon payment of the foregoing, any remaining income from licensing may be considered the property of the contractor.

In the event of termination or expiration of this contract, any unexpended balance of net royalties received for use at the Facility shall be transferred, at DOE's request to a successor contractor, or in the absence of a successor contractor, to such other entity designated by the Government.

(N) The contractor may establish, subject to the approval of the contracting officer, a policy for

the sharing of royalties with creators of computer software, principally based on gross revenues.

Where the contractor has a corporate policy for incentive awards including sharing royalties with software creators or the contractor is a subsidiary or affiliate and its parent corporation has an incentive and royalty sharing policy, the corporate sharing policy may be approved by the contracting officer for use at the Facility.

Whenever any annual incentive awards or annual royalty to a software creator exceeds ten percent (10%) of the software creator's annual base salary, the contractor shall:

(a) Identify all such software creators to the contracting officer.

(b) Provide an accounting of time spent by each such creator on private consultations, work for others projects and DOE mission work.

(c) Provide a review of DOE mission work and ensure that no conflict or apparent conflict of interest exists with respect thereto for such creators.

(O) The contractor will develop administrative procedures to avoid actual or apparent conflicts of interest relating to the contractor's claims to copyrights in computer software. Such procedures shall be substantially the same as those for subject inventions elected by the contractor pursuant to the Patent Rights article of this contract, and, further, shall include procedures to insure compliance with DOE orders covering scientific and technical computer software pertaining to unclassified scientific, technical, and technology-related computer software programs developed for or on behalf of DOE. Such administrative procedures are subject to approval of the contracting officer, who may request a report of such procedures not more than annually.

(P) The contractor may assert and establish a trademark or service mark incorporating and identifying name developed under this contract for computer software

copyrighted pursuant to this clause on the same terms and conditions as set forth for establishing and maintaining claim to copyright.

(Q) The extent of dissemination and commercialization of released copyrighted software achieved by the contractor will be evaluated as part of the annual appraisal process.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d)(1) above. If the contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the contracting officer to include such material in the technical data prior to its delivery.

(e) Subcontracting.

(1) Unless otherwise directed by the contracting officer, the contractor agrees to use in subcontracts having as a purpose the conduct of research, development, and demonstration work or in subcontracts for supplies, the contractor clause provisions in 48 CFR 952.227-75 in accordance with the policy and procedures of 48 CFR 927.402-1, 927.402-2 and 927.402-3.

(2) It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons for the subcontractor's refusal and other pertinent information which may expedite disposition of the matter; and

(ii) Not proceed with the subcontract without the written authorization of the Contracting Officer.